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7 UNITED STATES DISTRICT COURT
8 NORTHERN DISTRICT OF CALIFORNIA
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10 QIN CHEN,

No. C 07-2188 WDB

11 Petitioner,

ORDER RE PETITIONER'S
PENDING MOTION FOR
SUMMARY JUDGMENT

12 v.

13 MICHAEL CHERTOFF, Secretary,
14 Department of Homeland Security,
15 et al.,

16 Respondents.
17 _____/

18 **FACTUAL BACKGROUND**

19 Petitioner Qin Chen, appearing pro se, is a citizen of the People's Republic of
20 China. She came to the United States as a student at the University of California -
21 Davis, and graduated with a masters degree in chemistry and a Ph.D. in electrical
22 engineering. Petitioner is employed as a research assistant.

23 On March 11, 2004, petitioner filed an I-140 "Immigrant Petition for Alien
24 Worker" on her own behalf.¹ She also filed an employment-based I-485 "Application
25 _____

26 ¹A person may file an I-140 petition on her own behalf if she:

27 1. Has extraordinary ability in the sciences, arts, education, business, or athletics
demonstrated by sustained national or international acclaim, whose achievements have been
recognized in the field; or

28 2. Is a member of the profession holding an advanced degree or is claiming exceptional
ability in the sciences, arts, or business, and is seeking an exemption of the requirement of a job

1 To Register Permanent Residence or Adjust Status” with the United States Citizen and
2 Immigration Services (“USCIS”), California Service Center.² Petitioner sought an
3 adjustment of status to a lawful permanent residency because of her employment with
4 a U.S. company. Her I-140 was granted, but the USCIS has not adjudicated
5 petitioner’s I-485 application.

6 The general requirements for employment-based adjustment of status
7 applications are that the alien is the beneficiary of an approved I-140 petition, is in
8 lawful immigration status, has a visa number immediately available under the annual
9 per-country and preference category quota, and is not inadmissible to the United
10 States under listed statutory grounds that include health-related, criminal, and national
11 security provisions. Declaration of F. Gerard Heinauer in Support of Respondent’s
12 Motion for Summary Judgment, filed on 11/09/07 (“Heinauer Decl.”) at ¶6.
13 According to the USCIS, two factors have impeded its ability to finally adjudicate
14 petitioner’s application: (1) the FBI has not completed its “name check” security
15 review and (2) visas are not available in petitioner’s employment-based “preference”
16 category.

17 Petitioner filed a “Petition for a Writ of Mandamus to Compel Administrative
18 Action” on April 7, 2007, asking this Court to compel respondents to make a
19 determination on petitioner’s I-485 application. Petitioner’s petition for a writ of
20 mandamus is brought under the federal question statute, 28 U.S.C. § 1331; the
21 Mandamus Act, 28 U.S.C. §1361; 28 U.S.C. § 1651; the Administrative Procedures
22 Act, 5 U.S.C. §§ 555, 701 *et seq.*; and the Declaratory Judgment Act, 28 U.S.C. §§
23 2201 *et seq.*

24 On November 9, 2007, petitioner and respondents filed their respective Motions
25 for Summary Judgment. Respondents timely filed their opposition to petitioner’s
26

27 offer in the national interest.

28 See USCIS Form I-140 Instructions (Rev. 10/12/07), <http://www.uscis.gov>.

²Petitioner’s application was subsequently transferred to the Nebraska Service Center.

1 motion. Although petitioner did not file an opposition to respondents' motion,
2 respondents filed a reply brief. The motions were deemed submitted on November
3 30, 2007.

4 On December 11, 2007, the Court denied respondents' motion for summary
5 judgment, and deferred ruling on petitioner's motion pending limited discovery on
6 whether petitioner belongs in the "first preference" or "second preference" category
7 for employment-based Chinese applicants. Petitioner was given an opportunity to
8 resubmit that issue via a motion for summary judgment following discovery if she
9 developed sufficient evidence to support such a motion. See, Order re Cross Motions
10 for Summary Judgment, filed December 11, 2007. Because petitioner did not file any
11 such motion with the Court, we assume she concedes that she belongs in the "second
12 preference" category for employment-based applicants.

13 In its December 11, 2007, Order the Court also scheduled a case management
14 conference for February 26, 2008. In response to two requests from the parties, the
15 Court continued this conference to March 17, 2008, and then to April 21, 2008. See,
16 Stipulation and Order, filed February 21, 2008, and Stipulation and Order, filed March
17 13, 2008.

18 On April 7, 2008, the government filed the parties' joint case management
19 conference statement. ("April 7th Joint Statement"). The parties provided updated
20 information pertaining to both alleged impediments -- the pending FBI name check
21 and visa availability. The parties also requested that the Court continue to defer ruling
22 on petitioner's motion.

23
24 **FBI name check**

25 The Court is prepared to rule in connection with the portion of petitioner's
26 motion seeking an order directing the government to complete its name check and
27 adjudicate petitioner's I-485 application (so that, assuming her application is
28 approved, she might be poised to receive a visa when one becomes available).

1 However, according to the government, the USCIS has recently implemented a new
2 policy designed to respond to the substantial number of immigration applications that
3 have been delayed for processing by the FBI's inability to complete many applicants'
4 name checks in a timely manner. See, Declaration of Michael A. Cannon, filed
5 November 9, 2007, attached to Defendants' Motion for Summary Judgment,
6 (describing name check program and FBI's backlog).

7 Under USCIS' new policy, an applicant for immigration benefits who is
8 otherwise eligible for those benefits but whose application cannot be adjudicated
9 because the FBI has not yet returned the applicant's name check results will be
10 approved for the benefit sought. See, USCIS "Interoffice Memorandum," dated
11 February 4, 2008, attached as Exhibit to April 7th Joint Statement. The government
12 represents that petitioner is eligible to have her I-485 application approved but for the
13 FBI name check and indicates that once a visa becomes available the USCIS will
14 adjudicate her application "even if petitioner's name check is still pending." April 7th
15 Joint Statement at ¶13.³

16 Pursuant to USCIS' new policy it would not be necessary for the Court to
17 compel the government to complete the FBI name check so that USCIS could decide
18 petitioner's application.

20 visa availability

21 United States employers may file a petition to hire foreign workers using Form
22 I-140. Similarly, U.S. citizens and green card holders can file petitions for certain
23 family members using Form I-130. The filing of a petition (or of the labor
24 certification application for employment-based petitioners) establishes a "priority

27 ³The government does not intend to forego the name check altogether. If when the FBI
28 finally returns the results the FBI's information indicates that the applicant was not eligible for
immigration benefits, the government will begin a process by which it can rescind previously
granted benefits. See, Exhibit to April 7th Joint Statement.

1 date.” Priority dates determine a beneficiary’s “place in line” relative to other
2 beneficiaries in the same category and nationality for visa allocation.

3 The Immigration and Nationality Act (“INA”) establishes formulas relating to
4 and limits on the annual number of employment-based visas and certain family-based
5 visas in order to regulate immigration to the United States. The Department of State
6 (“DOS”) allocates these visas by estimating how many immigrant visas will be
7 available and publishes the results in a monthly “Visa Bulletin.” If the number of
8 visas available in a category exceeds demand for them, the Visa Bulletin will indicate
9 that the category is “current.” A petition in a current category filed today can be
10 processed for a visa today. If the demand for visas exceeds what is available in a
11 category, the Visa Bulletin will indicate a cutoff date and the issuance of visas is
12 restricted to applicants whose priority dates are earlier than the cutoff date. Petitions
13 with priority dates after the published date must wait until DOS advances the posted
14 date to obtain a visa. However, cutoff dates also can “retrogress,” which occurs when
15 the actual number of applications received exceeds the number DOS estimated would
16 be used for the visas available.

17 Only about 140,000 aliens and their derivative relatives can get permanent
18 residency through their employment-based applications during each fiscal year.
19 Heinauer Decl., at ¶18. This total number is divided per country and per preference
20 category by Congress.⁴ *Id.* There must be a visa number available in the relevant
21 category at the time an employment based I-485 application is filed.⁵ Declaration of
22 F. Gerard Heinauer, filed November 29, 2007, attached to Defendants’ Reply,
23 (“Suppl. Heinauer Decl.”), at ¶10. Consular officers abroad and USCIS are required
24

25 ⁴China is usually oversubscribed and the numbers of visas are generally more available
26 in the first and second employment-based categories (aliens of extraordinary or exceptional
27 ability and advanced degree professionals) than in the third preference (skilled workers with 2
years of experience or training and professionals with a baccalaureate degree). *Id.*

28 ⁵Visas were available in the Second Preference category for Chinese workers on March
11, 2004, when Petitioner filed her application(s). However, during the 48 months that
petitioner has been waiting for adjudication of her applications visa availability in this category
has become oversubscribed.

1 to report to the Department of State applicants for immigrant visas abroad and for
2 adjustment of status within the United States in the limited visa categories so that the
3 Department of State can administer the availability of immigrant visas and advise the
4 public of the likely future flow of numbers in the various categories. *Id.*

5 In September 2007, the Department of State indicated that there would be visa
6 numbers for second preference Chinese workers available for petitions bearing
7 priority dates earlier than January 1, 2006. Suppl. Heinauer Decl., at ¶8. Petitioner
8 did not obtain a visa at this time because USCIS had not yet approved her application.
9 Subsequently, the Department of State announced that the cut-off date for second
10 preference Chinese applicants regressed to January 1, 2003. Suppl. Heinauer Decl. ¶¶
11 8, 12. Petitioner's priority date for visa number purposes is the date of filing of her I-
12 140 application -- March 11, 2004. Suppl. Heinauer Decl., at ¶7. Because petitioner's
13 priority date is March 2004, she would not have been eligible for a visa when the cut-
14 off date regressed to January 1, 2003, *even if* USCIS otherwise had completed
15 processing her application.

16 Because USCIS represents that it will now grant eligible petitions awaiting only
17 FBI name check results, it appears that petitioner will receive a visa when one
18 becomes available in her preference category. See, April 7th Joint Statement. The
19 April 2008 Visa Bulletin provides that the cutoff date for second preference Chinese
20 workers now is December 1, 2003. See, April 2008 Visa Bulletin. The Court is
21 encouraged by the eleven month jump. However, because the priority date for second
22 preference Chinese applicants is December 1, 2003, and petitioner's priority date is
23 March 11, 2004, a visa number still is not available to petitioner under the second
24 preference category. USCIS cannot complete petitioner's case before a visa number
25 becomes available to her. *Id.*

26 The parties ask the Court to defer ruling on petitioner's motion in order to await
27 information about visa availability contained in the May Visa Bulletin. April 7th Joint
28

1 Statement at ¶14. The Court GRANTS the parties' request and will refrain from
2 ruling on petitioner's motion at this time.

3 The Court will proceed with the case management conference scheduled for
4 **April 21, 2008, at 1:30 p.m.** The parties may appear by telephone. Counsel for the
5 government must initiate the conference call and must telephone the Court with
6 petitioner on the line at (510)-637-3909.

7
8 **CONCLUSION**

9 For the reasons stated above, the Court GRANTS the parties' request to delay
10 ruling on petitioner's motion for summary judgment.

11 **On April 21, 2008 at 1:30 p.m.,** the Court will conduct a case management
12 conference to assess the status of Petitioner's case *unless*, by April 18, 2008, the
13 parties have notified the Court that the government has completed adjudication of the
14 I-485 petition.

15 IT IS SO ORDERED.

16 Dated: April 9, 2008

17 
18 WAYNE D. BRAZIL
United States Magistrate Judge

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20 copies to:
parties of record,
21 wdb, stats
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